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In The

Supreme Court of the United States

October Term, 1985

SALVATORE PROVENZANO, JACK SPERO, and JACK DWYER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Does not 18 U.S.C.§ 1954 require, as the plain language of the statute states, a showing that a union welfare plan official accept benefits with intent to be influenced in his duties, as opposed to the interpretation below which, by eliminating any such intent requirement, completely ignored the congressional purpose and turned the statute in a mere status crime?

2. Whether the mail fraud statute, 18 U.S.C. § 1341, permits an indictment to charge multiple unspecified mailings where accepted law makes each mailing a separate offense, thus rendering the indictment totally duplicitous and violative of a defendant's constitutional rights.

3. Whether Rule 18, Fed. R. of Crim. Proc., which requires trial at the place within the district most convenient to the defendants and witnesses, can be disregarded to accommodate the court's administrative convenience, and whether a defendant complaining of a violation of the Rule must, after conviction, demonstrate prejudice of some sort?

4. Does not the Confrontation Clause require that co-conspirator hearsay declaration be attended by adequate assurances of reliability, and was not that constitutional mandate violated here.

LIST OF PARTIES

The parties appearing in the United States Court of Appeals for the Third Circuit were Salvatore Provenzano, Jack Spero, Marvin Zalk, Jack Dwyer, Gerald Hogan and Linda Rubino.

TABLE OF CONTENTS

Page

Questions Presented i

List of Parties ii

Table of Contents iii

Table of Citations iv

Opinions Below 1

Jurisdiction 2

Constitutional and Statutory Provisions Involved 2

Statement of the Case 2

Reasons for Granting the Writ 6

I. The decision below has misinterpreted 18 U.S.C. § 1954 and expanded that statute far beyond the legislative intent. 6

II. The decision below has sanctioned a duplicitous manner of pleading mail fraud offenses that is in irreconciliable conflict with the traditional and accepted view of the elements of that crime. 12

III. The court's rejection of petitioner's argument that Rule 18, Fed. Rules of Crim. Proc., required transfer of the trial to another vicinage within the district, was not only wrong but demonstrates a confusion among the Circuits on this important issue. 16

Contents

Page

IV. The admission of critical co-conspirator declarations deprived petitioners of their Sixth Amendment right to confrontation. 21

Conclusion 26

TABLE OF CITATIONS

Cases Cited:

Dupont v. United States, 388 F.2d 39 (5th Cir. 1967) 17, 18, 19

Dutton v. Evans, 400 U.S. 74 (1970) 22, 23, 25

Mattox v. United States, 156 U.S. 237 (1895) 25

Russell v. United States, 369 U.S. 749 (1962) 15

Ohio v. Roberts, 488 U.S. 56 (1980) 22, 25

United States v. Aldridge, 484 F.2d 655 (7th Cir. 1973), cert. denied, 415 U.S. 921 (1973) 13

United States v. Ammar, 714 F.2d 238 (3rd Cir. 1983) 22, 23, 25

United States ex rel. Bennett v. Rundle, 419 F.2d 599 (3rd Cir. 1969) 19

United States v. Burns, 662 F.2d 1378 (11th Cir. 1981) 17, 19, 20

Contents

Page

United States v. Chindamongse, ____ F.2d ____, 37 Cr. L. 2458 (No. 82-5265, 4th Cir. Aug. 28, 1985) 25

United States v. Clark, 416 F.2d 63 (9th Cir. 1969) 19, 20

United States v. Critchley, 353 F.2d 358 (3rd Cir. 1965) 15

United States v. Crummer, 157 F.2d 958 (1st Cir. 1946) 13

United States v. Eskow, 422 F.2d 1060 (2d Cir. 1970), cert. denied, 398 U.S. 99 (1970) 14, 15

United States v. Fernandez, 480 F.2d 726 (2nd Cir. 1973) 17

United States v. Florence, 456 F.2d 46 (9th Cir. 1972) 20

United States v. Friedland, 660 F.2d 919 (3rd Cir. 1981) 10, 11

United States v. Gomberg, 715 F.2d 843 (3rd Cir. 1983) 13

United States v. Hart, 524 F.Supp. 381 (E.D. Pa. 1981) 13

United States v. Isaacs, 347 F.Supp.. 743 (N.D. Ill. 1972) 14

Contents

Page

United States v. Lewis, 504 F.2d 92 (6th Cir. 1974), cert. denied, 421 U.S. 975 (1975) 20

United States v. Margiotta, 646 F.2d 729 (2d Cir. 1981) 14

United States v. Nance, 533 F.2d 699 (D.C. Cir. 1976) 15

United States v. Orzechowski, 547 F.2d 978 (7th Cir. 1977), cert. denied, 431 U.S. 906 (1977) 14

United States v. Palmeri, 630 F.2d 192 (3rd Cir. 1980) 8, 10, 11

United States v. Silverman, 430 F.2d 106 (2d Cir. 1970), cert. denied, 402 U.S. 953 (1971) 14

United States v. States, 488 F.2d 761 (8th Cir. 1973), cert. denied, 471 U.S. 909 (1974) 13

United States v. Tanner, 471 F.2d 128 (7th Cir. 1972), cert. denied, 409 U.S. 949 (1972) 14

United States v. Tarnopol, 561 F.2d 466 (3rd Cir. 1977) 13

United States v. Warner, 428 F.2d 730 (8th Cir.), cert. denied, 400 U.S. 930 (1970) 14

United States v. Weatherspoon, 581 F.2d 595 (7th Cir. 1978) 13, 15

Contents

Page

United States v. Wright, 588 F.2d 31 (2nd Cir. 1978), cert. denied, 440 U.S. 917 (1979) 23

United States v. Zeidman, 540 F.2d 314 (7th Cir. 1976) 13

Statutes Cited:

18 U.S.C. § 371 2

18 U.S.C. § 1341 .....i, 2, 13

18 U.S.C. § 1954 .....i, 2, 3, 6, 7, 8, 9, 10, 12

18 U.S.C. § 3161(a) 17

28 U.S.C. § 1254(1) 2

United States Constitution Cited:

Fifth Amendment 14

Sixth Amendment 2, 14, 21

Rules Cited:

Rule 18, Federal Rules of Criminal Procedure ....i, 2, 16, 17, 19, 20

Local Rule 11(a), United States District Court for the District of New Jersey 17

Evidence Rule 801(d)(2) 22

Contents

Page

Evidence Rule 801(d)(2)(E) 25

Other Authority Cited:

Notes of Advisory Committee on Rules, Rule 18 17

APPENDIX

Opinion of the United States Court of Appeals for the Third Circuit (Filed June 27, 1985) 1a

Order on Petition for Rehearing (August 1, 1985) 7a

Judgment of the United States Court of Appeals for the Third Circuit 9a

Constitutional and Statutory Provisions Involved 11a

No.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Salvatore Provenzano, Jack Spero and Jack Dwyer pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on June 27, 1985 (9a-10a), which judgment affirmed judgments of conviction entered by the United States District Court for the District of New Jersey on March 16, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals may be found in the Appendix hereto (1a-6a).

JURISDICTION

The judgment of the Court of Appeals was entered on June 27, 1985 (9a-10a). A timely petition for rehearing with suggestion for rehearing en banc was denied on August 1, 1985 (7a-8a). This Court's jurisdiction is invoked under Title 28, U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States, Title 18 U.S.C. § 1341, and § 1954, as well as Rule 18, Federal Rules of Criminal Procedure, are all involved in this case. These constitutional and statutory provisions are set out in the appendix hereto (11a-13a).

STATEMENT OF THE CASE

Petitioners, along with three others, were convicted after a four month jury trial of conspiracy (18 U.S.C. § 371), mail fraud (18 U.S.C. § 1341) and the unlawful receipt of benefits by union officials (18 U.S.C. § 1954). The conspiracy count alleged a scheme whereby petitioners were said to have obtained unauthorized dental treatment for themselves and members of their families, with the treatment being paid for by union welfare funds through a system of inflated and falsified claim forms.

Petitioners, Provenzano, Spero and Dwyer, as well as co-defendants, Hogan, Nunzio Provenzano, Andrew Reynolds and Thomas Reynolds, were all Teamster officials while co-defendant Zalk was administrator of most of the pension and welfare funds of the unions involved, and co-defendants Marcus and Rubino were associated with Welfare Plan Administrators, the entity that was hired to run the several union dental plans. The two Provenzanos and Thomas Reynolds were officials of Local 560,

Dwyer and Spero of Local 641, Hogan with Local 660 and Andrew Reynolds with Local 84.

Prior to trial Nunzio Provenzano pleaded guilty to the § 1954 count in which he was named and shortly into trial Marcus pleaded guilty to the conspiracy charge. After 9 days of deliberation the two Reynolds were acquitted while the others were convicted on some or all of the counts in which they were named. Provenzano received a three year sentence; Spero a one year term and Dwyer a two year sentence.

Beginning in the spring of 1959, a number of North Jersey Teamster locals, constituting the Trucking Employees of North Jersey Welfare Fund (TENJ) initiated a dental plan for their members (Tr. 2665-2671).[1] At the very outset Dr. Leo Marcus was retained to operate the dental plan, which he did through a corporate entity known as Welfare Plan Administrators (WPA) (Tr. 133, 1090) (118A). Marcus submitted a proposal, which was reviewed by the Fund trustees, was interviewed and his credentials were thoroughly checked before the contract was finally signed (119A-120A) (Tr. 2267-2670). Marcus then assembled a closed panel of dentists who were to participate in the plan, set the fee schedules and processed all of the required paperwork. He also, in some instances to be discussed hereafter, reviewed and approved certain dental work before it was performed by the panel dentist.

Initially, the plan covered a basic examination, cleaning and x-rays, as well as required fillings or extractions, on an annual basis for which the dentist received a basic fee per patient (Tr. 129-130, 1088-1089, 2111-2112). Additional work, such as removable dentures and root canal therapy was also covered, for

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1. "Tr" references are to the original trial transcript which, except in the few instances noted hereafter, is numbered sequentially throughout, and is reproduced in the volumes entitled Joint Appendix-Trial Transcript. 'A" references were to the Joint Appendix.

which the dentist received an additional amount (Tr. 131-133). Periodontal treatment, orthodonture and crowns or other fixed bridgework were not included at the beginning of the plan (Tr. 132-133, 212). However, commencing in about July 1984, crown coverage was added, providing for payment to the dentist of $100 per tooth, with a maximum of six (6) permitted in a three year period (Tr. 134, 210-211, 2623). The dentist could charge in excess of these amounts, with the patient remaining responsible for any amount due over the plan allowance (Tr. 134, 2112). However, prior authorization from Marcus was required for crown or fixed bridgework (Tr. 135, 212).

Each year the patient would receive a new authorization card from WPA, which would be presented to the dentist who would then mail it back to WPA (Tr. 135-136, 206-207, 2913-2914). When work was performed the dentist would complete a three part claim form, have it signed by the patient, and send it to WPA. Thereafter, he would receive back a copy of the form with one or more checks covering a number of patients, separated however by the particular union fund which covered them (Tr. 147-148).

Every month WPA would send the Welfare Fund a statement with a list of amounts to be paid to each dentist, and the Fund would then transfer an appropriate amount of money to a special account, from which payment would be made by Marcus to the dentists (Tr. 2634-2635). Marcus received separate payment for his administration fee, which was based upon the number of eligible members covered by the plan (Tr. 2549).[2]

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2. Marcus received modest increases over the years, all of which were considered by Trustees in a routine manner (Tr. 2569-2578, 4921-4927, 5078-5079) (122A-129A). Indeed, Marcus' first request for an increase in his administration fees came 10 years after he began operating the plan (Tr. 2571).

Commencing as far back as 1963 there began to develop a pattern whereby certain dentists were informed by Marcus that some individuals, usually but not always union officials or members of their families, were to be treated specially. These people were provided care over and above that authorized by the plan, upon approval by Marcus, and the dentist would then send his full bill to WPA and receive payment. In most instances which were the subject of testimony at trial, the work on these "special patients", as they will be referred to, consisted either of crown or fixed bridgework, either before such coverage was added to the plan in 1974 or thereafter but in amounts in excess of that permitted by the plan, or root canal work in excess of that permitted by the plan (Tr. 1091-192, 2113-2113). In such cases Marcus arranged for the dentist to be paid for this uncovered work by adding extra amounts for covered work never performed on either the claim form of that patient or on the form of another, unrelated patient being treated by that dentist in the same period (Tr. 225-233, 1432-1433, 2114-2115).

Uniformly, Marcus always told the dentist not to discuss the matter of fee or payment with any of the special patients (*e.g.*, Tr. 665, 2114, 1741, 2755-2756).

Marcus' scheme with respect to these special patients did not extend only to officials of the unions involved in this case. It extended beyond these unions to others, not only Teamster Locals (Tr. 545-546), and beyond union people as well. Thus, Marcus arranged for similar benefits to be extended to numerous of his own personal friends and relatives, including his wife, sister, attorney, and even distributed his largesse to his chauffeur and doorman (Tr. 1158-1162, 1335-1337, 1651-1653, 1714-1715, 2051-2054, 2080-2085). In addition, he arranged treatment for many of his employees at WPA and their family members (Tr. 1573-1580). All of these people, of course, were not covered by any dental plan but their work was paid for out of welfare funds

by the same system of inflated claim forms discussed above. There was not the slightest hint that any defendant knew of treatment being rendered to any of these non-union people.

Without setting it out in detail, there was evidence that both petitioners and members of their families received uncovered dental work at various times over the years while they were union officials. There was no direct testimony of any conversations between either petitioner and the dentists involved or between them and the dental administrator, Marcus, that would suggest direct knowledge on their part as to the unlawful benefits being received. The government relied upon circumstantial evidence leading to inferences that the officials knew or should have known that the dental work being received was not covered by the plan. Similarly, there was no proof of any specific benefits received by Marcus from the various welfare plans in return for the benefit being provided to the union officials.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW HAS MISINTERPRETED 18 U.S.C. § 1954 AND EXPANDED THAT STATUTE FAR BEYOND THE LEGISLATIVE INTENT.

The decision in this case has seriously misinterpreted an important and frequently used federal criminal statute, 18 U.S.C. § 1954, in a manner that disregards the obvious legislative intent and dangerously broadens the reach of the statute into wholly unchartered waters leading the Third Circuit into direct conflict with its own prior decision and taking the Circuit well beyond the parameters set by other Circuits under this statute involving an area never addressed or defined by this Court. The result of the Third Circuit decision is that these petitioners,

unconstitutionally, unjustly and unfairly have been subject to the criminal sanction of conviction, substantial fines, forfeiture of office and, worst of all, loss of liberty and incarceration for conduct identical to that judged to be non-criminal by Third Circuit on a different occasion.

The statute in issue, 18 U.S.C. § 1954, in pertinent part, provides as follows:

> Whoever being—
>
> (1) an administrator, officer, trustee, custodian, counsel, agent, or employee of any employee welfare benefit plan or employee pension benefit plan; or
>
> * * *(3) an officer, counsel, agent or employee of an employee organization any of whose members are covered by such plan; receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money or thing of value *because of or with intent to be influenced with respect to any of his actions, decisions or other duties relating to any question or matter concerning such plan* . . . shall be fined not more than $10,000 or imprisoned not more than three years, or both. [Emphasis supplied.]

The statute is simple and unambiguous. It states that a person holding one of the enumerated positions who requests or receives anything of value because of any of his actions, decisions or duties related to any question or matter concerning the plan or receives or requests anything of value with intent to be influenced with respect to any actions, decisions or duties relating to any question or matter concerning the plan is guilty of a crime.

For the purposes of this argument, it is conceded that petitioners occupied a defined position and received things of value by way of unauthorized dental benefits.

Cutting through the semantics and verbal adornments, the Government's legal theory embodied in their request to charge, which was accepted by the trial judge, over defense objection, and as now sanctioned by the Third Circuit on this appeal, in substance and effect reduced the elements required for conviction to only two: (1) that a person hold a certain position and (2) that they receive a thing of value.

By its decision herein the Third Circuit has permitted the Government to impose criminal sanctions where Congress has chosen not to do so and has thereby created a new crime. The ruling is unprecedented.

In *United States v. Palmeri,* 630 F.2d 192 (3rd Cir. 1980), the Third Circuit reviewed jury convictions of a number of defendants under 18 U.S.C. § 1954 in connection with a scheme involving fund deposits into certain banks in return for loans and kickbacks. Although the trial jury returned a guilty verdict as to all the defendants in *Palmeri,* the Third Circuit reversed the conviction of one appellant, Flen Chestnut, who was a union official and had received over $80,000 in improper benefits even though the court's opinion found that "Chestnut knew he would be unable to repay the loans when he obtained them, . . ., he obtained them not on the basis of his financial position but because of his position with the Union." *United States v. Palmeri, supra* at 206.

After paraphrasing the statutory language, the trial judge in this case charged petitioners' jury that they could convict a defendant if:

> . . . (1) he knowingly received the free dental treatment intending to be influenced favorably toward the retention of Leo Marcus and Welfare Plan Administrators as the dental services provider for this welfare fund; (2) he knowingly received the free dental treatment because of his actual or apparent capacity to directly or indirectly influence the operation of the welfare fund in a manner favorable to Marcus and WPA. There is no requirement that he actually agreed to exercise such influence. You are instructed that a defendant need not have the actual ability to influence the management of a welfare fund to violate Section 1954. A defendant need have only the apparent ability to do so by virtue of his official status. In addition, there is no requirement under Section 1954 that a defendant actually exercised or attempted to exercise his influence as the result of his receipt of fees, kickbacks, money, or things of value. That is, the Government need not show specific acts favoring Marcus and WPA on the part of a defendant that would amount to paybacks for free dental treatment [Tr. 78-79; 12/9/83].

This instruction clearly told the jury that a defendant may be found guilty if (1) he received unauthorized dental benefits (2) because of his actual or apparent capacity to influence the fund or, in other words, because of his Fund position. As the court stated "A defendant need have only the apparent ability to do so . . . [influence the Fund] . . . by virtue of his official status." (Tr. 78-79, 12/9/83).

If the decision of the Circuit in this case stands, the heart of the crime under 18 U.S.C. § 1954 as enacted by Congress has been removed, that is the requirement that a Union or Fund official

receive a benefit *because of activities or decisions taken* concerning Fund matters or because of *his intent to be influenced* as to Fund matters at issue.

The error of the Third Circuit apparently has its genesis in *dicta* arising out of *United States v. Friedland,* 660 F.2d 919 (3rd Cir. 1981). However, in that case the facts clearly showed the presence of all the elements necessary to convict under 18 U.S.C. § 1954. Friedland was counsel to the Fund, he received a bribe and the proof was overwhelming that the money was received with the *stated intent* to be influenced as to Fund decisions, so much so that while the 3.5 million dollar loan was closing in New York, Friedland was received a $315,000 payoff in cash in the Bahamas.

Friedland attempted to bootstrap himself onto an issue raised in *Palmeri, supra,* where certain appellants were not directly Fund officials and raised the issue of their capacity to influence Fund matters. Friedland likewise urged that he was entitled to have the jury decide whether he had the capacity to influence Fund matters. The Circuit squarely and properly rejected Friedland's appeal and stated:

> We have reached the following conclusion:
> a) Implicit in the finding that appellants were counsel to the Fund is a finding of sufficient duties to bring them within the scope of § 1954. Appellants need not have committed any acts in order to violate the "because of" provision of § 1954; *it is sufficient that they accepted payment with the stated purpose of exercising their influence over the Fund.*

Friedland, supra at 922. (emphasis supplied).

In attempting to expound further on its decision, however, the Circuit spoke to an issue not truly present in *Friedland* and suggested that if certain persons in certain defined positions received benefits, with ostensible power to exercise influence over Fund matters, a case might be made out for conviction under the statute, *Friedland, supra* at 926.

The dicta of *Friedland* has become the holding of this case by virtue of the Government's reliance on it, the trial court's charge to the jury and the Circuit's blanket rejection of all issues raised on appeal in this case. The conviction of these petitioners is, nevertheless, irreconciable with the decision of the Third Circuit in *United States v. Palmeri, supra,* (Flen Chestnut, appellant).

The Circuit decision in this case absolutely misinterprets the statute enacted by Congress and, through its implicit reliance on its dicta in *Friedland, supra,* perpetrates a mistaken construction of basic English grammar which has resulted in the wrongful conviction of these petitioners.

There can be no more compelling duty for this Court than to set aside an unjust conviction, particularly when it involves an obvious miscarriage of justice, designating as criminal, conduct which Congress did not make criminal and which the same Circuit Court on a prior occasion so strongly and correctly felt was noncriminal that it reversed a jury conviction. *United States v. Palmeri, supra.*

Both the original decision of this Circuit and its decision on application for rehearing were simply blanket memo decisions containing neither reasons nor explanations. The reversal of the conviction of Flen Chestnut in *Palmeri, supra,* is absolutely contradictory to the affirmance of the convictions in this case. If these convictions are assumed to be supported by *United States v. Friedland, supra,* then that decision as well as this is directly at odds with *Palmeri, supra.*

Only a grant of certiorari by this Court will enable these petitioners to correct the injustice which has been done to them and, at the same time, enable this Court to correct a gross misinterpretation of 18 U.S.C. § 1954 which, if unchecked, can only lead to further mistakes and confusion and repeated wrongful convictions and miscarriage of justices throughout the country. The statute in question is frequently employed by the Government in prosecutions of union officials. If it is to be rewritten that task should be undertaken by Congress, not the courts.

II.

THE DECISION BELOW HAS SANCTIONED A DUPLICITOUS MANNER OF PLEADING MAIL FRAUD OFFENSES THAT IS IN IRRECONCILIABLE CONFLICT WITH THE TRADITIONAL AND ACCEPTED VIEW OF THE ELEMENTS OF THAT CRIME.

Prior to trial petitioners moved to dismiss Count 2, the mail fraud charge, on the ground that it was duplicitous (92A-93A). Without comment, the motion was denied (103A).

Count 2 charged that the defendants, for the purpose of executing the scheme and artifice to defraud caused certain items to be mailed, specifically,

> . . .(a) *dental treatment claim forms* which contained falsified entries involving a total amount of approximately $160,000 covering the treatment costs for the "special patients" herein; (b) checks from the respective welfare plans in payment of the said claims (including the false and fraudulent portions thereof); (c) *letterhead bills* from the various dentists to Welfare Plan Administrators relating to the unauthorized treatment of the

> "special patients"; and (d) *correspondence* from welfare plan administrators to the various dentists (including pre-authorization forms) indicating "approval" for the special treatment —. [54A-55A]. [Emphasis added.]

By definition, a duplicitous count is one that charges more than a single offense, *United States v. Gomberg,* 715 F.2d 843, 845 (3rd Cir. 1983), which was precisely the vice of this mail fraud allegation. It is clear that the count charges a whole variety of unspecified mailings, in the form of claim forms, checks and correspondence, pursuant to the scheme set out in Count I and incorporated by reference. However, it is equally clear that each separate mailing constitutes a separate offense as the mail fraud statute has been uniformly interpreted over the years.

The essence of the crime of mail fraud is the use of the mails. Thus, not every fraudulent scheme can be prosecuted under the statute, but only those in which the mails are used. *United States v. Tarnopol,* 561 F.2d 466, 471 (3rd Cir. 1977). The focus of the offense is upon the misuse of the postal service. *United States v. States,* 488 F.2d 761, 767 (8th Cir. 1973), *cert. denied,* 471 U.S. 909 (1974). It is not the scheme to defraud which is the indictable act under the statute. Even though the offense "has its genesis in the scheme to defraud the gist of the crime is the use of the mails." *United States v. Crummer,* 157 F.2d 958, 962 (1st Cir. 1946). Thus, "each mailing in furtherance of a scheme to defraud is a separate offense under 18 U.S.C. § 1341 even if there is but one scheme involved." *United States v. Weatherspoon,* 581 F.2d 595, 601-602 (7th Cir. 1978); *accord, United States v. Aldridge,* 484 F.2d 655, 660 (7th Cir. 1973), *cert. denied,* 415 U. S. 921 (1973); *United States v. Zeidman,* 540 F.2d 314, 317 (7th Cir. 1976); *United States v. Hart,* 524 F.Supp. 381 (E.D. Pa. 1981). It necessarily follows that Count 2 was duplicitous since it alleged very specifically that a multitude of items were mailed pursuant to this scheme.

A duplicitous count violates both the Fifth and Sixth Amendments. The prohibition against duplicity is intended to protect a defendant's right under the Sixth Amendment to notice of the nature and cause of the accusation so that he may prepare a defense. *United States v. Tanner,* 471 F.2d 128, 139 (7th Cir. 1972), *cert. denied,* 409 U.S. 949 (1972); *see United States v. Silverman,* 430 F.2d 106, 1210 (2d Cir. 1970), *cert. denied,* 402 U.S. 953 (1971). The rule against duplicity also guards against the possibility that "confusion as to the basis for the verdict may subject the defendant to double jeopardy in the event of a subsequent prosecution", in violation of the Fifth Amendment. *United States v. Tanner, supra,* 471 F.2d at 139. With a duplicitous count, "the accused is denied the clear concurrence of all the jurors as to each offense charged as the basis of conviction. . . . [I]t is impossible for the jury to find him guilty of some offenses charged in the duplicitous count and not guilty as to others." *United States v. Isaacs,* 347 F.Supp. 743, 755 (N.D. Ill. 1972). *See United States v. Warner,* 428 F.2d 730, 735 (8th Cir.), *cert. denied,* 400 U.S. 930 (1970). Therefore, "the verdict does not reveal whether the jury found the defendant guilty on both or one or the other of the offenses charged." *United States v. Orzechowski,* 547 F.2d 978, 986 (7th Cir. 1977), *cert. denied,* 431 U.S. 906 (1977).

In order to sanction this obviously duplicitous pleading of mail fraud the Court of Appeals, at the Government's urging, followed the the unprecedented holding of the Second Circuit in *United States v. Margiotta,* 646 F.2d 729, 732-733 (2d Cir. 1981). In that case the court held that the essence of mail fraud is the scheme to defraud and therefore allegations of multiple mailings in a single count do not render it duplicitous so long as there is but a single scheme. That holding, followed here, not only runs counter to the long-accepted view of mail fraud endorsed by other Circuits, but apparently to prior interpretation in the Second Circuit as well. *See United States v. Eskow,* 422 F.2d 1060,

1064 (2d Cir. 1970), *cert. denied*, 398 U.S. 99 (1970) (holding that each mailing constitutes a separate offense), which, extraordinarily, is not even mentioned in *Margiotta*.

Permitting multiple mailings in a single mail fraud count makes a shambles of the rule against duplicity. Thus, in this case the defendants were deprived of the opportunity to know which specific mailings the jury held them accountable for, by virtue of the fact that the indictment specified no particular mailing and the court's charge permitted a conviction based upon any of some 132 mailings placed in evidence. The evil we complain of is not an academic one since in this case the jury might have found a defendant responsible for mailings flowing from dental work performed upon one of a number of his family members, while, if forced to focus on specific mailings, it might just as likely have found him responsible for none. Under this indictment one would never know.[3] The decision here is not only contrary to settled precedent but provides the Government with further leeway in its use of this already much-abused statute. The decision places the Second and Third Circuits at odds with at least the Seventh Circuit, *see United States v. Weatherspoon, supra*, and presents an important issue which is bound to reoccur. Review by this Court is clearly warranted.

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3. The Government's belated effort to identify a number of mailings prior to trial as constituting the basis for the mail fraud count, an idea apparently borrowed from *Margiotta*, could not, of course, save the defective count. In essence this information constituted a Bill of Particulars, and it is absolutely basic that a bill of particulars cannot save an invalid indictment. *Russell v. United States*, 369 U.S. 749 (1962); *United States v. Critchley*, 353 F.2d 358, 362 (3rd Cir. 1965); *United States v. Nance*, 533 F.2d 699, 701 (D.C. Cir. 1976), a procedure which, if permitted, would circumvent the historic role of the grand jury

III.

THE COURT'S REJECTION OF PETITIONER'S ARGUMENT THAT RULE 18, FED. RULES OF CRIM. PROC., REQUIRED TRANSFER OF THE TRIAL TO ANOTHER VICINAGE WITHIN THE DISTRICT, WAS NOT ONLY WRONG BUT DEMONSTRATES A CONFUSION AMONG THE CIRCUITS ON THIS IMPORTANT ISSUE.

Prior to trial defendants moved to have this case, which had been assigned to Judge Thompson in the Trenton vicinage, transferred to Newark, pursuant to Rule 18, Fed. Rules of Crim. Proc.[4] The motion was accompanied by an affidavit of Provenzano's counsel (89A-91A) indicating the following: (1) that Provenzano lived in Bergen County and worked in Hudson County both in the northern part of the State; (2) that counsel lived and worked in Essex County, also in the Newark vicinage; (3) that the drive to Trenton from the Essex County area takes about one and one-half hours, and that it is a tiring trip, particularly over the course of a long trial; (4) that all of the prospective defense witnesses were from northern New Jersey; (5) all of the unions involved in the case were also located in Hudson County.

Rule 18, Federal Rules of Criminal Procedure, provides that while trial of an offense shall take place in the district in which the crime was committed, the place of trial within the district shall be fixed "with due regard to the convenience of the defendant and the witnesses and the prompt administration of justice."

While the trial court has discretion in fixing the place of trial within the district, in the exercise of that discretion it has been

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4. The Federal District in New Jersey, though constituting a single judicial district, sits in three vicinages, Newark, Trenton and Camden, corresponding roughly to the northern, central and southern portions of the State.

held that the court must give due regard to the three factors set out in the Rule, *United States v. Burns,* 662 F.2d 1378, 1382 (11th Cir. 1981). The court is simply not authorized to fix the place of trial on the basis of any other considerations. *Id.* Thus, it has been held that the convenience of the prosecution is not an appropriate factor to be considered, *Dupoint v. United States*, 388 F.2d 39 (5th Cir. 1967), nor is the convenience of the trial judge. *United States v. Fernandez,* 480 F.2d 726, 730 (2nd Cir. 1973).

While the 1979 Amendment to Rule 18 added the phrase concerning the "prompt administration of justice", in the interest of complying with the Speedy Trial Act of 1974, 18 U.S.C. § 3161(a), it did not in any way alter the intent of the Rule so as to permit the fixing of the place of trial to be based on any other reasons than those stated. *Notes of Advisory Committee on Rules, Rule 18.*

There was no apparent reason why this case was placed in Trenton. Rule 11(a) of the Local Rules for the District said that in allocating cases to Newark, Camden or Trenton, the Clerk

> . . . shall take into consideration the residence of the defendant, the convenience of the litigants, counsel and witnesses, and the place where the cause of action arose.

At the argument of the motion, the trial judge did address herself to the merits of the Rule 18 argument, suggesting that the decision as to where the case would be tried was simply out of her hands (Tr. Aug. 2, p. 115). The case had been allocated to Trenton under a new assignment plan for federal criminal cases in the District of New Jersey which apparently randomly distributes the cases to the Newark, Trenton or Camden vicinages in order to serve the administrative convenience of the court and its

available resources. While the judge acknowledged the hardship in traveling to Trenton every day (Tr. Aug. 2, p. 115), it was, she said, simply 'the reality of our particular court in New Jersey, the number of cases we have and the number of judges and courtrooms we have" (Tr. Aug. 2, p. 117). She went on to note:

> We don't have enough courtrooms to accommodate the cases or the number of judges to accommodate them at the place that would be most convenient. [Tr. Aug. 2, p. 117].

Without making any actual inquiry into the availability of judges or courtrooms in Newark to accommodate *this* case, the Court simply felt that,

> . . .we must assume when this case was sent out to me in Trenton, that the decision was made in Newark with some consideration what judges were there, what courtrooms were there . . . the decision is made with some thought. It's not just completely a blind decision to send cases out. [Tr. Aug. 2, p. 118].

Unfortunately, the "decision" to which the court referred was not a judicial decision, but an administrative one made not by a judge but by the *Clerk of the Court*! It would render the Rule meaningless to permit it to be abrograted in this fashion. No local rule of court can simply override one of the federal rules:

> "The Federal Rules of Criminal Procedure have the force and effect of law. Just as a statute, the requirements promulgated in those Rules must be obeyed.

Dupoint v. United States, supra, 388 F.2d at 44.

To make matters worse, the trial judge here completely abdicated her judicial function by adopting a "my hands are tied" approach to the problem.

In this case, all of the defendants, as well as counsel, and virtually all of the witnesses were from the north Jersey area. Indeed, almost all of the prosecution witnesses were also from the same area. It is difficult to see who, other than the judge, was convenienced by having this case heard in Trenton for over three months, far from the situs of the parties, witnesses and events involved in the case.

While at least one case has cryptically suggested that a defendant must demonstrate prejudice from a Rule 18 violation, *United States v. Clark,* 416 F.2d 63, 64 (9th Cir. 1969),[5] we suggest that such an approach be rejected, as it was in *Dupoint v. United States, supra* at 44, and *United States v. Burns, supra,* 662 F.2d at 1383 n. 5. It will normally be impossible to show "prejudice" in any convincing manner. Obviously, a defendant must attend the trial, whether it is convenient or not, and if a key witness does not wish to travel a subpoena is always available. How can a defendant, or his attorney, make a record of the physical and mental toll taken by the daily trip, compounded, of course, when the case is as long as this one? As the Third Circuit noted in another context (concerning denial of the right to a public trial), it is difficult to envisage a case in which evidence of specific injury would be available and thus no showing of prejudice should be required. *United States ex rel. Bennett v. Rundle,* 419 F. 2d 599, 608 (3rd Cir. 1969).

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5. Although *Clark* said that the defendant had shown no "abuse of discretion or prejudice", the opinion gives no facts against which to judge this statement. The trial there was apparently moved 90 miles away, but there is no information given as to where defendant or his witnesses lived or any other facts from which one could assess whether there was any inconvenience. For all that appears, the removed place of trial could have been closer to defendant's home. The absence of facts makes the case completely useless as a guide.

Some cases have suggested that the fixing of the place of trial is solely within the trial judge's discretion. *United States v. Clark, supra; United States v. Florence,* 456 F.2d 46, 50 (9th Cir. 1972); *United States v. Lewis,* 504 F.2d 92, 97 (6th Cir. 1974), *cert. denied,* 421 U.S. 975 (1975). However, even assuming a grain of truth in those statements, that discretion is not, and cannot be, an unfettered one. Indeed, as the court said in *United States v. Burns, supra,* the discretion involved is one that can only be exercised with regard to the three considerations set out in the Rule. 662 F.2d at 1382. Discretion cannot be used as an excuse to avoid applying the Rule, *United States v. Lewis, supra* at 97-98. In this case no discretion was exercised at all. The Rule was simply ignored.

If a defendant does not care where his case is heard he may, of course, waive the Rule's protection. *United States v. Burns, supra* at 1383. But if he does care, he is entitled to the benefit of the Rule, *id.*, whose requirements are "not lightly to be evaded." Clearly, the issue of Rule 18's force and meaning has bedeviled the Courts of Appeals. The courts are in conflict over whether the matter is one confined to the District Court's unfettered discretion and therefore whether review of such a ruling must be under an "abuse of discretion" standard, as well as whether a defendant complaining of non-compliance with the Rule must demonstrate "prejudice", whatever that term could mean in this context. Here, the opinion simply noted that the argument had no merit. It is obviously an important and recurring issue, closely tied to the administration of the criminal justice system. It presents a serious conflict at a point where the law (Rule 18) interfaces with reality (the lack of courtroom space, availability of judicial resources, etc.). It is an issue that should, therefore, be addressed definitively by this Court.

IV.

THE ADMISSION OF CRITICAL CO-CONSPIRATOR DECLARATIONS DEPRIVED PETITIONERS OF THEIR SIXTH AMENDMENT RIGHT TO CONFRONTATION.

Over objection (Tr. 1475-1507, 1877-1878)[6] the Government was permited to elicit from one of its key witnesses, Dr. Jerrod Belitz, a critical and devastating co-conspirator declaration made to him by Leo Marcus. In discussing his proposed treatment of a union official named Thomas McDermott in 1979 or 1980, Belitz related that Marcus had called him to the Dental Plan office and said that "upstairs would never approve it" (Tr. 1559). Marcus said that the estimate submitted by Belitz for crown work on McDermott was too expensive, and that,

> Upstairs would never go along with it and that if I bring this to the committee, they are not going to approve it [Tr. 1560].

Belitz went on to testify that Marcus' office, where this conversation took place, was on the second floor of 707 Summit Avenue, Union City, and that the Welfare Fund office was on the third floor and the Local 560 offices on the fifth floor of that same building (Tr. 1560-1561). Belitz further said that Marcus had personally used the phrases "upstairs" or "the committee" in their conversations when the amount of a proposed fee for crown work was put in question or where he had proposed an extensive treatment plan. On those occasions, Marcus would say that "he would have to consult a committee" before he gave approval for the work to be done (Tr. 1561). These commments by Marcus were generally part of a "tirade of response" (Tr.

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6. At the conclusion of the Government's case the defendant moved to strike all of the hearsay discussed in this Point (Tr. 3420).

1563), and were made about ten times over the years (Tr. 1564). When Dr. Belitz once asked Linda Rubino who constituted this "committee", she replied, "There is no committee". (Tr. 1565).

This was a rather unique case, in which proof of the conspiracy was almost entirely circumstantial. There were, without exception, no "smoking guns" in the sense of inculpatory conversations between the defendants and witnesses by which the defendants' knowledge of the unlawful scheme could be established. The sole exception to this general pattern was the statement at issue. If believed, it provided critical direct proof that there had in fact been direct communication concerning the subject matter of the conspiracy between Leo Marcus and certain officials (the Committee) "upstairs". From the point of view of Provenzano, whose union office was upstairs and who was also a trustee of the welfare fund "upstairs", the statements could hardly have been more devastating. Although Belitz was available for cross-examination, the declarant, defendant Marcus, was not. He had, at that point, already pleaded guilty and was acknowledged to be unavailable (Tr. 6426-6428).

In *United States v. Ammar,* 714 F.2d 238, 254-257 (3rd Cir. 1983), the Third Circuit held that the mere fact that a co-conspirator declaration satisfies the requirements of Evidence Rule 801(d)(2), does not automatically satisfy the requirements of the Sixth Amendment's Confrontation Clause. "It must be separately ascertained whether co-conspirator statements sought to be admitted are attended by adequate assurances of reliability." *Id.* at 256. That conclusion was said to follow from this Court's decisions in *Ohio v. Roberts,* 488 U.S. 56, 65-66 (1980) and *Dutton v. Evans,* 400 U.S. 74, 88-89 (1970), in particular from the fact that the Confrontation Clause "countenances only hearsay marked with such trustworthiness that 'there is no material departure from the reason of the general rule'." *Ohio v. Roberts, supra,* 448 U.S. at 65.

Here, the reliability or trustworthiness of the statements in question was decidedly weak. As Dr. Belitz acknowledged on cross-examination, Marcus usually made the remarks when he was upset about either Belitz's charges or the extent of a proposed treatment plan (Tr. 1730-1731). Belitz felt that Marcus was using the reference to the "committee" or "upstairs" as leverage to either put off giving answers to him or to get him to decrease his proposed fee (Tr. 1731, 1805-1806). Furthermore, the comments were not related merely to Local 560 special patients but covered people from all different unions (Tr. 1732-1733). And, when Linda Rubino told Belitz, quite spontaneously, that there was no such committee, the two were not only quite friendly but he trusted her (Tr. 1733), a situation which contrasted with his own assessment of Marcus, whom he had found to be less than candid and truthful over the years (Tr. 1862). In commmon parlance, Marcus used the reference to the committee to 'chisel' on the fees Belitz wanted to charge (Tr. 1762-1763). At the conclusion of the witness's testimony, counsel specifically pointed out, in renewing a motion to strike, the manner in which cross-examination had demonstrated the unreliability of the statement (1878-1879).

Thus, there was demonstrated here a strong incentive for Marcus to lie in making the statements, contrary to the circumstances present in *United States v. Ammar,* 714 F.2d at 256-257, and in addition, and again contrary to Ammar, there was absolutely no corroboration as to the existence of a "committee" or as to any consultation between Marcus and those persons "upstairs'. *United States v. Wright,* 588 F.2d 31, 38 (2nd Cir. 1978), *cert. denied,* 440 U.S. 917 (1979).

Furthermore, it could hardly be said that the evidence at issue here was neither devastating nor crucial. *Dutton v. Evans, supra,* 400 U.S. at 87; *United States v. Wright, supra.* As we have noted above, these statements, if believed, constituted the *only* direct evidence of both knowledge on the part of the defendants as to

the receipt of uncovered dental benefits by others as well as of the existence of a conspiracy itself. At least with respect to defendant, Provenzano, whose office was in fact "upstairs", these statements attributed to Marcus pointed explicitly in his direction and informed the jury that, according to Marcus, decisions as to uncovered benefits were, at least in the case of Dr. Belitz's patients, discussed with him as well as unnamed others constituting a committee of some sort. In light of the generally circumstantial nature of the Government's case these proofs were indeed devastating. Nor was the potential impact of those statements lost upon the Government, who employed them effectively in their rebuttal summation, one of the last things the jury heard before retiring to deliberate:

> Lastly, who was involved in approving treatment for the special patients? Dr. Marcus was involved to some extent, Linda Rubino was involved to some extent and *the committee upstairs*, a committee of individuals were involved. *Who was on that commitee.* Who was deciding who would get free treatment? *The defendants in this case* were involved in that decision also. [Tr. 123]. [Emphasis added.]

Thus, at the very conclusion of the case the devastating impact of this out of court declaration was emphasized vividly and forcefully.

While forced to suffer the impact of these statements defendant's hands were tied in terms of any effective cross-examination since the declarant was unavailable. The use of the co-conspirator exception to introduce these statements deprived defendant of,

> a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Mattox v. United States, 156 U.S. 237, 242-243 (1895), quoted in *Ohio v. Roberts,* 448 U.S. at 63-64.

The question of precisely how the Confrontation Clause interacts with the various hearsay exceptions, particularly the co-conspirator exception of Evidence Rule 801(d)(2)(E) continues to pose a problem for the various lower courts, despite this Court's pronouncements in *Dutton* and *Ohio v. Roberts.* Thus, the Fourth Circuit has just recently held that a statement falling within 801(d)(2)(E) automatically carries sufficient "indicia of reliability" to satisfy the Confrontation Clause as interpreted in *Ohio v. Roberts. United States v. Chindamongse,* ____ F.2d ____, 37 Cr. L. 2458 (No. 82-5265, 4th Cir. Aug. 28, 1985). That ruling is contrary to the position taken by the Third Circuit in *United States v. Ammar,* which, in turn, was ignored in this case. The issue continues to be important and unresolved and this case presents an excellent vehicle for further review.

CONCLUSION

Wherefore, petitioners respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Jack Dwyer

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT (FILED JUNE 27, 1985)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 84-5212/3/4/5, 84-5238 & 84-5249

UNITED STATES OF AMERICA

v.

PROVENZANO, SALVATORE, JACK SPERO, MARVIN ZALK, JACK DWYER, GERALD HOGAN, and LINDA RUBINO,

Salvatore Provenzano, Appellant in No. 84-5212

Jack Spero, Appellant in No. 84-5213

Marvin Zalk, Appellant in No. 84-5214

Jack Dwyer, Appellant in No. 84-5215

Gerald Hogan, Appellant in No. 84-5238

Linda Rubino, Appellant in No. 84-5249

(Crim. Nos. 83-00104-07/10/03/05/02—Dist. of N.J.—Trenton)

District Judge: The Honorable Anne E. Thompson

Argued on April 29, 1985
(Opinion Filed: JUNE 27, 1985)

Opinion

Before: SEITZ, WEIS and ROSENN, *Circuit Judges*.

MEMORANDUM OPINION OF THE COURT

SEITZ, *Circuit Judge*.

These are appeals by six defendants from sentences imposed by the district court after convictions by a jury.

These defendants were convicted of violations of one or more criminal statutes, viz., conspiracy to commit certain substantive offenses, mail fraud, receiving kickbacks, embezzlement and obstruction of justice. All the offenses arose out of the misuse of union welfare funds primarily by union officials.

Starting in about 1960 certain union locals decided to establish dental benefit programs for their members and hired Dr. Leo Marcus to administer the programs (Administrator), for which he was paid a fee under a fixed formula. The dental plans of the locals utilized a closed panel system of dentists to provide service to the union members, their spouses and minor children. Any beneficiary of a plan needing dental work received an authorization card from the Administrator, which he took to a dentist. The dentists charged a fixed fee for certain services which was noted on the card along with a description of the work done. The card was then returned to the Administrator. After doing the necessary processing, the plan sent a monthly check to the dentist for the total fees for that month. Every member was made aware of the benefits provided by the plans. Of critical importance here, the plans contained certain exclusions. If excluded service was performed, payment was to be made directly by the individual served, not the plan.

Opinion

Shortly after the plans commenced operation, the Administrator, at the behest of one or more of the defendants, began advising some plan dentists that certain patients, who were or had a special relationship with union officials, were to receive services not covered by the plan without having to pay for those services. This scheme was implemented by a plan under which these payments ultimately came to the dentists from the plans. This practice continued over the years until the 1980s and involved considerable misuse of the welfare funds for such payments. The appellants, other than Marvin Zalk, were found by the jury to be illegally involved in the scheme.

The principal contention made by these defendants is that the evidence was insufficient to support their convictions on the various counts. In view of the their conviction the evidence must be reviewed in the light most favorable to the government. *Glasser v. United States*, 315 U. S. 60 (1942). We have reviewed the prolix evidence in these cases under such standard and are completely satisfied that the government's evidence was more than sufficient to warrant the jury in convicting these defendants.

We do note that the government's evidence fully warranted the jury in concluding that these appellants (Zalk aside) were well aware of the fact that they were receiving or causing others to receive benefits from the funds for services not payable from the funds. The attempt to shift the total blame for this state of affairs to the Administrator and Linda Rubino, his assistant, was obviously rejected by the jury. It would serve no useful purpose to repeat in detail the elaborate supporting evidence appearing in this record. Its evaluation was for the jury, not the district court or this court.

Opinion

Defendant Marvin Zalk contends that the evidence was insufficient to sustain his conviction for obstruction of justice. A review of the record evidence clearly shows that a jury issue was created which justified the verdict against him.

Defendants challenge certain jury instructions. We have reviewed the charge and find no reversible error even if the instructions might be considered somewhat inadequate, a conclusion we do not share.

Nor do we find error in the charge to the jury in relation to 18 U.S.C. § 1954 as it applied to defendants Spero, Dwyer and Provenzano. See *U. S. v. Friedland*, 660 F.2d 919 (3d Cir. 1981), *cert. denied*, 456 U.S. 989 (1982).

Defendants contend that though the indictment charged one conspiracy, they were convicted on proof which showed multiple conspiracies. Given the nature of the scheme we are satisfied that only the conspiracy charged in the indictment was involved. It is true that it covered many years, involved events arising at different times and embraced many individuals. But those circumstances did not thereby necessarily create multiple conspiracies. A sufficient common objective and membership linkage existed to justify a finding of a single conspiracy.

The defendants convicted of mail fraud argue that Count Three is duplicitous because it joins multiple mailings within a single count. The short answer is that the government is free to rely on multiple mailings when they are essentially no more than jurisdictional bases for the federal charge. See *U. S. v. Margiotta*, 646 F.2d 729 (2nd Cir. 1981), *cert. denied*, 416 U.S. 913 (1982).

Opinion

We have examined the following claims of error made by one or more of the defendants and find them without merit:

The denial of defendant Spero' motion to exclude the issue of fiduciary duties from the indictment and jury charge;

The admission of co-conspirator declarations;

The denial of defendant Provenzano's motion for disclosure of the grand jury's transcript of his own witness;

Comment by the government in its rebuttal summation on the failure of some defendants to testify;

The denial of defendants' motions for severance;

The denial of defendants' motion for disclosure of grand jury attendance records;

The denial of defendants' motion to transfer the trial to Newark, New Jersey;

The denial of defendant Zalk's motion to disqualify government attorneys;

The denial of defendant Rubino's motion for an evidentiary hearing on the issue of electronic surveillance of her attorney's office.

The judgment of the district court will be affirmed.

Opinion

To the Clerk of the Court:

Please file the foregoing Memorandum Opinion.

s/ Seitz

Circuit Judge

ORDER ON PETITION FOR REHEARING
(AUGUST 1, 1985)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 84-5212, 84-5213, 84-5215

UNITED STATES OF AMERICA

v.

SALVATORE POVENZANO, JACK SPERO, JACK DWYER

Salvatore Provenzano Appellant in No. 84-5212

Jack Spero Appellant in No. 84-5213

Jack Dwyer Appellant In No. 84-5215

(Criminal Nos. 83-00104-07, 85-00104-10, 84-00104-04)

SUR PETITION FOR REHEARING

PRESENT: ALDISERT, *Chief Judge*, SEITZ, ADAMS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, and ROSENN, *Circuit Judges*.

The petition for rehearing filed by appellants in the above entitled cases having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service

Order

not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court

s/ Seitz

Circuit Judge

DATED August 1, 1985

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 84-5212/3/4/5, 84-5238 & 84-5249

UNITED STATES OF AMERICA

V.

PROVENZANO, SALVATORE, JACK SPERO,
MARVIN ZALK, JACK DWYER, GERALD HOGAN,
and LINDA RUBINO

Salvatore Provenzano, Appellant in No. 84-5212

Jack Spero, Appellant in No. 84-5213

Marvin Zalk, Appellant in No. 84-5214

Jack Dwyer, Appellant in No. 84-5215

Gerald Hogan, Appellant in No. 84-5238

Linda Rubino, Appellant in No. 84-5249

(Crim. Nos. 83-00104-07/10/03/05/02—Dist. of N.J.—Trenton)

District Judge: The Honorable Anne E. Thompson

Argued on April 29, 1985

Judgment

Before: SEITZ, WEIS and ROSENN, *Circuit Judges*

JUDGMENT

These matters came on to be heard on the record from the United States District Court for the District of New Jersey (Trenton) and was argued before this court on April 29, 1985.

On consideration whereof, it is now here Ordered and Adjudged by this court that the judgment of the District Court entered on March 14, 1984, be and the same is hereby affirmed.

ATTEST

s/ Sally Mvros
Clerk

DATED: June 27, 1985

Certified as a true copy and issued in lieu of a formal mandate as to Nos. 84-5212 and 84-5213 Only On September 13, 1985.

Test: s/ M. Elizabeth Ferguson
Chief Deputy Clerk, United States Court of Appeals
for the Third Circuit.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

In all criminal prosecutions, the accused shall enjoy the right to a speedy trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

TITLE 18, UNITED STATES CODE § 1341

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be

delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

TITLE 18, UNITED STATES CODE, § 1954

Whoever being—

(1) an administrator, officer, trustee, custodian, counsel, agent, or employee of any employee welfare benefit plan or employee pension benefit plan; or

(2) an officer, counsel, agent, or employee of an employer or an employer any of whose employees are covered by such plan; or

(3) an officer, counsel, agent, or employee of an employee organization any of whose members are covered by such plan; or

(4) a person who, or an officer, counsel, agent, or employee of an organization, which, provides benefit plan services to such plan

receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to, any of his actions, decisions, or other duties relating to any question or matter

concerning such plan or any person who directly or indirectly gives or offers, or promises to give or offer, any fee, kickback, commission, gift, loan, money or thing of value prohibited by this section, shall be fined not more than $10,000 or imprisoned not more than three years, or both.

RULE 18, FEDERAL RULES OF CRIMINAL PROCEDURE

RULE 18. Place of Prosecution and Trial

Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses and the prompt administration of justice.